

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE

FILED
March 5, 1998
Cecil W. Crowson
Appellate Court Clerk

DOUGLAS E. BUMPUS,)	
)	MONTGOMERY CIRCUIT
Plaintiff/Appellee)	
)	NO. 01S01-9707-CV-00144
v.)	
)	HON. JAMES E. WALTON,
BIRMINGHAM-NASHVILLE)	JUDGE
EXPRESS, INC.,)	
and THE TRAVELERS)	
INSURANCE COMPANY,)	
)	
Defendants/Appellants)	

<u>For the Appellant:</u>	<u>For the Appellee:</u>
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MEMORANDUM OPINION

Members of Panel:

Justice Lyle Reid
Senior Judge William H. Inman
Special Judge Joe C. Loser, Jr.

AFFIRMED

INMAN, Senior Judge

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

I

This is another gradually-occurring injury case involving physical disability not caused by trauma, specific episode, or 'accidental injury' as the term is historically used, that would best be resolved by appropriate legislation.

The plaintiff is a career truck driver who developed osteoarthritis in both knees to the extent that full knee replacements were required. The prostheses were successful and after three months the plaintiff resumed his truck driving career. Nevertheless, the trial judge found that the plaintiff suffered a 70 percent vocational disability to both legs. His monetary recovery was limited to 260 weeks because of his age.

The employer appeals, insisting that: (1) the plaintiff's arthritic condition is not compensable because non-job related; (2) the award is excessive; and (3) the lump sum order is improper.

II

The plaintiff was born in August, 1934. While he has held a number of jobs, he is a career over-the-road truck driver. He began working for the defendant in 1984. He is described as a freight peddler, meaning that he delivers and unloads the cargo he transports. Over the years the wear and tear occasioned by lifting and carrying heavy loads began to affect his bodily joints, particularly his knees. In 1987 or 1988, he sought treatment for his knees from Dr. James R. Smith, who diagnosed arthritis, about which nothing could be done. The condition worsened, his legs bowed, and knee replacements were recommended.

III

Dr. James Smith practices general internal medicine, with 35 years experience. Through the years he has treated many patients for arthritic diseases, one of whom is the plaintiff. In 1987, he diagnosed the plaintiff as suffering from osteoarthritis, which he described as degenerative changes of the joint spaces, deterioration of the cartilages, and laying down of new bones around those joint spaces which will cause a joint destruction.

He testified that “the more wear and tear that you place on your joints from any cause, you will get more of an acceleration of this process.”

In 1995, his examination of the plaintiff prompted this comment, manuscripted on the plaintiff’s record:

“The most prominent debility and disability he has is his severe crippling degenerative osteoarthritis. The left knee is by far the major joint that is affected. And with an amount of deviation he has of the tibia at this time, I am sure that Gene will need to have replacement knee surgery within the next year or two. He is now becoming very debilitated and disabled from walking. And with his job as a truck driver in and out of a cab all day delivering parcels and boxes, I don’t see how he can continue this work.”

He further testified:

Q: Doctor, did you take a history at any time during your seeing Mr. Bumpus as to what he’s done for a living?

A: To my knowledge, he has been a truck driver most of his life.

Q: All right. Are you aware of what his particular job involved? And I’m referring you to your February 27, ‘95 note.

A: As I understood it, he was a delivery type of truck driver, that he delivered goods. And that would require getting in and out of his cab most all day.

Q: Doctor, what is your opinion, if any, as to whether or not Mr. Bumpus’ employment as a truck driver aggravated and accelerated the physical changes in his knees and legs?

A: I think that in all probability that his getting in and out of the truck, weight bearing, squatting possibly, anything that put stress and strain on the knee joint by other change in the positions of the knees or weight bearing would aggravate osteoarthritis and help accelerate it.

Q: Doctor, does the fact that you found that the left knee, the knee that he would operate the clutch of the semi with, the fact that you found it worse than the right have any bearing on your finding this to be accelerated or aggravated by his job?

A: Well, the only thing I can say is any time you would use a knee or joint more and more day in, day out, I think that accelerates the process of osteoarthritis.

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Q: Doctor, would you describe for the judge the progression of the osteoarthritis in Mr. Bumpus from when you first saw him in 1988 till you saw him in 1995?

A: Well, I think that as the years went by, his knees and his osteoarthritis had progressed and it's gotten worse.

Q: What is involved in the progression or the deterioration of the knee? What happens in the knee?

A: Actually you get a destruction of the lining of the cartilaginous linings of the ends of the bones and you will get regression of the bones, more maybe on one side than the opposite side”

He summarized his opinion by stating that

“ . . . getting in and out of the truck, weight bearing, squatting possibly, anything that put stress and strain on the knee joint . . . would aggravate osteoarthritis and help accelerate it.”

IV

Dr. Cooper Beazley, an orthopedic surgeon, performed the knee replacement surgery. He testified:

Q: Dr. Bassly, after the surgery, did he attend any therapy?

A: I believe he did probably for a total of about four to six weeks.

Q: What would be the period of time, Dr. Beazley, he would have been disabled from working because of his knee condition and the surgery?

A: Typically about three months.

Q: Would that be typical in this case?

A: Yes.

- Q: Dr. Beazley, did you later take a history of what he did for a living; and if so, what would that be?
- A: He worked as a semi-tractor-trailer-truck driver where he would drive freight back and forth and crawl in and out of the cab of his truck.
- Q: Did you take a history, did he do any other physical work while working as a truck driver?
- A: I think he did some loading and unloading also.
- Q: Dr. Beazley, what type of result do you feel like he had from the total knee replacements?
- A: I think he's had a good result to date.
- Q: What limitations would you expect one to have on their mobility after having a total knee replacement on both legs?
- A: Well, he doesn't have normal flexion, the ability to bend the knee completely, but he really has very few limitations. The main thing with him is I've told him, these are artificial knees and they have to last, so I recommended he not abuse them.
- Q: What is the life expectancy of a set of artificial knees?
- A: Somebody in his age, his body weight and who is very compliant, you know, the percentages are that 90 percent of those knees will be functioning in ten years. Longer out than that, with his type of prosthesis, there is no way to really predict.
- Q: And, Dr. Beazley, what is your opinion as to the amount of physical impairment he retains as a result of the injury - - as a result of his knee conditions?
- A: The AMA Guide books say 35 percent of the lower extremity for a good result, which I think he would qualify for that.
- Q: All right. Doctor, is this a case of body as a whole or is the impairment confined to the leg itself?
- A: I think that rating is to the leg.
- Q: All right. And that's AMA Guidelines, what edition?
- A: The red book, 4th.
- Q: Dr. Beazley, I want to pass you some restrictions that I'd like for you to look at. Dr. Beazley, are those the

restrictions that you placed on him in regard to his work place?
[no squatting or kneeling; limited climbing]

A: Yes.

Q: Are those permanent restrictions?

A: Yes.

Q: All right. Dr. Beazley, the impairment you have given, is that a permanent impairment?

A: The one you asked for is, yes, ma'am.

Q: Dr. Beazley, what is your opinion as to how long he had probably had osteoarthritis in his knees?

A: Well, by history, at least ten to fifteen years.

Q: Dr. Beazley, what causes arthritis to develop in the knees?

A: Well, it can just occur all on its own. Typically, that's what - - in a lot of people what does happen. It can occur after trauma or an injury. It can be a disease process that has a strong family history of it. But typically osteoarthritis, there is usually something that will trigger it, although some people are more susceptible to it than others.

Q: Did he have a family history of this?

A: Not that I know of. Not to my knowledge, no.

Q: Did he have a history of any knee injuries?

A: No.

Q: Dr. Beazley, what is your opinion as to whether or not his job as a truck driver aggravated or accelerated the osteoarthritic condition?

A: I think it probably accelerated it. I mean, he was young. He was only sixty-one years old. But I believe eventually he would have had this same problem at the normal age that people get it, in their seventies, without any precipitating events.

Q: One more question, Doctor, as to the causation. What is your opinion as to what is most likely the contributing factor to the acceleration of the arthritis?

A: Well, by his history, probably crawling in and out of the truck multiple times a day and having to lift loads

up and down, having to go up and down steps or squat.”

V

Dr. David Knapp, a board-certified rheumatologist, examined the plaintiff on July 30, 1996 for evaluation purposes. He testified:

“In interviewing this gentleman, there was no history of a discrete injury, fall, or similar insult. I summarized in my letter that I cannot say within a reasonable degree of medical certainty that the duties described would result in a permanent exacerbation of the pre-existing condition, osteoarthritis, nor would the activities he was doing cause osteoarthritis of both knees in the absence, again, of a discrete injury or insult.

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Q: Can you say within a reasonable degree of medical certainty what caused this arthritis condition?

A: Osteoarthritis is the most common type of arthritis, yet we are still unable to come up with a definite cause at this time.

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In this particular case, I did not have any history of discrete injuries. I have not really had occasion, in all these years, to see anyone in his line of work just develop osteoarthritis by virtue of climbing up and down or even handling cargo. In such instances, usually, one knee is involved and there usually can be an injury.

People don't normally injure both knees simultaneously, although, at one point in time, one knee can be injured, and at another point in time, the other knee could be injured.

In terms of osteoarthritis of the knees requiring knee replacements, I just have not had occasion to see a work-related case that affected both knees. Certainly, I have many patients with osteoarthritis in one or both knees. They have no work history to attribute the problem to. I might add, many patients don't even have an injury to attribute the problem to.

Q: Based on the history or the statements that the patient told you, based on your knowledge of what he does at work, climbing up and down and loading, doctor, my question is, are you aware of any injury or accident that might be considered a triggering incident, producing the patient's need for a knee replacement?

A: At this time, no.

Q: Aside from increasing the patient's pain or level of uncomfortableness, did you reach an opinion as to whether or not the patient's work at Birmingham-Nashville Express caused any anatomical progressions of the patient's condition?

A: At this time, I cannot reach that conclusion with a reasonable degree of medical certainty. I cannot say if this truck gentleman had never worked driving a truck that he would have ended up any differently one way or the other, for better or worse.

I can only say that there is no specific injury here that I find in the history or the records that I can attribute his osteoarthritis to, in a sense of what we call post traumatic arthritis, where one has had a significant injury and later on, develops degenerative arthritis.

Q: Did the patient's activities as a truck driver, getting up and down, loading and unloading, cause this arthritis?

A: To the best of my knowledge, I know of no event of work that caused this osteoarthritis in this gentleman.

Q: Could you, doctor, again, within a reasonable degree of medical certainty, as with all my questions, knowing that the patient climbed up and down a truck, loaded and unloaded throughout the day, state within a reasonable degree of medical certainty that that has not contributed to the acceleration of the patient's arthritic condition?

A: I cannot state that his continued occupation accelerated his osteoarthritis or resulted in having knee replacements sooner than if he had been a computer programmer.

I cannot state that within a reasonable degree of medical certainty. This is based upon the fact that most of my patients don't do truck driving and they have these problems.

In terms of the concept of repetitive trauma or cumulative trauma disorder, I think that concept does not apply here. That's usually limited to soft tissue structures.

VI

Our review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. T.C.A. §

50-6-225(e)(2). *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). We cannot substitute our judgment for that of the trial judge; a *de novo* review is a limited one which, as we have stated, involves a determination of whether the evidence preponderates against the judgment. *See, Wingert v. Government of Sumner County*, 908 S.W.2d 921 (Tenn. 1995).

Under the Tennessee Workers' Compensation Law, injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee are compensable. T.C.A. § 50-6-102(a)(5). "Injury" includes whatever lesion or change to any part of the system that produces harm or pain or lessened facility of the natural use of any bodily activity or capability. *See Fink v. Caudle*, 856 S.W.2d 952 (Tenn. 1993) and authority cited therein.

Where a condition gradually develops over a period of time, resulting in a definite, work-connected, unexpected, fortuitous injury, it is compensable as an injury by accident. *Brown Shoe Co. v. Reed*, 350 S.W.2d 65 (Tenn. 1961). The date of injury for a gradually occurring injury has been fixed as the date on which the claimant was forced to quit work because of severe pain. *Barker v. Home-Crest Corp.*, 805 S.W.2d 373, 374 (Tenn. 1991).

The employer takes the employee with all pre-existing conditions, and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if he had not had the pre-existing conditions. *Rogers v. Shaw*, 813 S.W.2d 397 (Tenn. 1991). The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor which the courts will consider along with all other relevant facts and circumstances, but it is for the courts to determine the percentage of the claimant's industrial disability. *Pittman v. Lasco Industries, Inc.*, 908 S.W.2d 932 (Tenn. 1995).

In cases where there is objective medical evidence of an aggravation of a pre-existing condition, the Supreme Court has generally allowed recovery. In

Brown Shoe, supra, the Supreme Court allowed recovery for injury to the ulnar nerve which was gradually injured by use of the worker's arm in operation of a machine. The Court held this constituted an injury within the meaning of the Workers' Compensation Law.

In *Crossno v. Publix Shirt Factory*, 814 S.W.2d 730 (Tenn. 1991), the Supreme Court held the working condition either caused the employee's injury or aggravated the condition, and allowed recovery where objective signs of aggravation of a pre-existing condition occurred as a result of the work the plaintiff was performing.

In *Cunningham v. Goodyear Tire & Rubber Co.*, 811 S.W.2d 888 (Tenn. 1991), recovery was not allowed because the only aggravation of the pre-existing condition was limited to an increase in pain, as contrasted to an advancement of the underlying condition.

In the case at Bar, the plaintiff's arthritis was a pre-existing disease, not caused by his work. If his disability is compensable, it must be shown that employment activities were the cause of further injury or advancement of the severity of the pre-existing condition. *Boling v. Raytheon Company*, 448 S.W.2d 405 (Tenn. 1969).

We have studied the depositions of the experts, none of whom appeared to be an advocate for a cause. Dr. Dyer opined that the plaintiff's activities in getting in and out of his truck, etc. "would aggravate osteoarthritis and help accelerate it." While the issue is close, very close, we cannot find that the evidence preponderates against the judgment, since there is substantial evidence that employment activities advanced the severity of the pre-existing disease.

VII

The appellant next argues that an award of 70 percent vocational disability to each leg is excessive.

The plaintiff has mechanical knees, and has returned to work. But his “new knees” will inevitably wear out, if he survives to 70 years of age, according to his surgeon, and he functions under limitations and restrictions.

In determining vocational disability, the Court must consider:

(a) the employee’s skills and training;

(b) the employee’s education;

(c) the employee’s age;

(d) local job opportunities; and

(e) the employee’s capacity to work at kinds of employment available in the local market in a disabled condition. *Perkins v. Enterprise Truck Lines, Inc.*, 896 S.W.2d 123 (Tenn. 1995). Additionally, the Court must consider the anatomical impairment rating and the restrictions as determined by the expert medical testimony. *Employers Insurance Company of Atlanta v. Heath*, 536 S.W.2d 341 (Tenn. 1976). The Court must also consider if the employee was able to return to his prior employment. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452 (Tenn. 1988).

Mr. Bumpus is 61 years of age, has a high school degree, and has a work history of being a sheet metal worker, laborer, truck driver, and freight peddler. He has a *Guidelines* permanent impairment of 35 percent to each leg and restrictions of no squatting, crawling, kneeling, and only occasional crouching or climbing. The extent of permanent disability or vocational disability is determined by the employee’s loss of earning capacity, which has been defined as being the extent of difficulty competing in an open labor market in the post-injury condition in view of the overall health and work history of the employee. *Holder v. Wilson*, 723 S.W.2d 104 (Tenn. 1987). We cannot find that the evidence preponderates against the award of 70 percent.

VIII

The appellant next insists that the lump sum award was improper. Each case is discrete, *Smith v. Gallatin Nursing Home*, 629 S.W.2d 683 (Tenn. 1982), and a good reason must be ascribed for the lump sum order. *North American Royalties v. Thrasher*, 817 S.W.2d 308 (Tenn. 1991). In the case at Bar, the plaintiff and his wife of 43 years have a stable, responsible relationship. Mrs. Bumpus has always managed the finances, and it is not controverted that she does so in a conservative, efficient manner. *See, Skinner v. CNA Ins. Co.*, 824 S.W.2d 164 (Tenn. 1992). We see no error here.

The judgment is affirmed at the costs of the appellant and the case is remanded.

William H. Inman, Senior Judge

CONCUR:

Joe C. Loser, Jr., Special Judge

Lyle Reid, Justice

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

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Appellate Court Clerk

<i>DOUGLAS E. BUMPUS,</i>	}	<i>MONTGOMERY CIRCUIT</i>
	}	<i>No. C10-324 Below</i>
<i>Plaintiff/Appellee</i>	}	
	}	<i>Hon. James E. Walton,</i>
<i>vs.</i>	}	<i>Judge</i>
	}	
<i>BIRMINGHAM-NASHVILLE</i>	}	
<i>EXPRESS, INC. and TRAVELERS</i>	}	
<i>INSURANCE COMPANY,</i>	}	<i>No. 01S01-9707-CV-00144</i>
	}	
<i>Defendants/Appellants</i>	}	<i>AFFIRMED.</i>

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Defendants/Appellants and their Surety, for which execution may issue if necessary.

IT IS SO ORDERED on March 5, 1998.

PER CURIAM